MALAYAN BANKING BHD.

v.

SYED ALI MOSHIN & ORS.

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[ORIGINATING SUMMONS NO. 25-2 OF 1991]
19 SEPTEMBER 1991

CIVIL PROCEDURE: *Appeal against decision of Magistrate - Judgment sum less than RM10,000 - Refusal by Registrar to register notice of appeal - General form of question of law to be appealed - Courts of Judicature Act 1964, s. 28(1) - Subordinate Court Rules 1980, O. 49 r. 2(1) - Rules of the High Court 1980, O. 53 r. 3.*

The plaintiff had obtained judgment in default of appearance before the Magistrate's Court against the defendants on 1 October 1984. On 4 April 1989, the applicant (second defendant) applied to set aside the judgment and his application was dismissed on 1 February 1991. On 5 February 1991, the applicant filed a notice of appeal against the Magistrate's decision but the Registrar refused to register the said notice on the ground that the judgment sum was less than RM10,000.

The issue before the Court is whether the Registrar was entitled to refuse.

Held:

[1] An appeal is said to lie to the High Court under s. 28 of the Courts of Judicature Act 1964 (the Act) when the Registrar of the High Court receives the record of appeal and enters it in a list of appeals. No record of appeal shall be received by the Registrar of the High Court where the amount in dispute is RM10,000 or less except on a question of law. This means that the Registrar shall not have sight of the appeal record if any one of the two qualifications is not fulfilled.

[2] By implication, the Registrar must have power to decide whether the notice of appeal on the face of it carries any of the qualifications so that it can be accepted to be filed.

[3] In the case of an appellant intending to appeal on a question of law, the notice of appeal must state at least in general form the question of law that he wishes to appeal on.

[4] There is no necessity for the Court below to have decided on particular point of law for the purpose of taking it on appeal under s. 28 of the Act.

[Application dismissed with costs.]

Legislation referred to:
Courts of Judicature Act 1964, s. 28(1)
Rules of the High Court 1980, O. 55 rr. 1, 3
Subordinate Courts Rules 1980, O. 49 rr. 2(1), 3(1), 3A(1)

For the applicant - B.M. Bodipalar; M/s. Balendran Chong Haranay & Bodi
For the respondent - S.M. Appadurary; M/s. Ten Appaduray & Wong

JUDGMENT

Lamin Mohd Yunus J:

Briefly the background to the originating motion before me is that on 1 October 1984, the plaintiff (that is the Malayan Banking Bhd.) obtained a judgment in default of appearance before the Kuantan Magistrate Court in Civil Suit No. 638/84 against four persons, one of whom is the present applicant who was cited as the 2nd defendant in the said suit. On 4 April 1989, the applicant applied to set aside the judgment in default and on 1 February 1991 his application was dismissed. On 5 February 1991, the applicant's Counsel filed a notice of appeal against the decision of the learned Magistrate but the Registrar refused to register the said notice on the ground that the judgment sum was less than RM10,000. Hence the present application praying for an order *inter alia* that the Registrar of the Subordinate Court do receive and register the said notice of appeal.

Now, the learned Counsel for the applicant argued before me that it was not for the Registrar of the Subordinate Court to interpret s. 28 of the Courts of Judicature Act 1964. He contended that notwithstanding that the judgment sum being less than RM10,000 he could still proceed with the appeal on the question of law as was provided under the said s. 28. The Registrar should not and could not determine the issue as to whether there existed a question of law or not in the case because at the time of filing the notice of appeal, the memorandum of appeal, the notes of evidence and even the grounds of judgment were not before the Registrar to enable him or her to determine as to whether there was a question of law to be decided by the High Court. Such a question, according to the learned Counsel for the applicant can only be decided by the High Court. By then the full record of appeal would have been before the Judge. I disagreed.

Section 28(1) of the Courts of Judicature Act 1964 provides:

> (1) Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate Court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law.

By virtue of O. 49 r. 2(1) of the Subordinate Courts Rules 1980, an aggrieved party may appeal to the High Court by filing a notice of appeal in Form 140 with the Registrar of the relevant Subordinate Court whose decision is being appealed. It must be filed within 14 days from the date when the judgment was pronounced. Form 140 is very clear in regard to the venue of filing as the addressee is the Registrar of the Sessions Court or of the Magistrate Court. Upon receipt of Form 140, the Registrar will send a copy of it (after having endorsed on it the date of receipt which is called the date of filing) to the Registrar of the High Court. (Order 49 r. 2(1) of the Subordinate Courts Rules). That is only by way of information to the High Court as only a copy is being forwarded. Only a cross-appeal, if any, is filed at the High Court (O. 55, r. 3 of Rules of the High Court 1980). The question is at what stage can an appeal be said to "lie to the High Court" as required under s. 28 of the Courts of Judicature Act. I say that an appeal is said to "lie to the High Court" when the Registrar of the High Court receives the record of appeal and enters it in a list of appeals (O. 55 r. 1 of Rules of the High Court 1980). The record of appeal of an appellant without the assistance of Counsel is prepared by the Subordinate Court whose decision is being appealed (O. 49 r. 3(1) of the Subordinate Courts Rules). While that of an appellant with Counsel, the appeal record will be prepared by his Counsel (O. 49 r. 3A(1) of the Subordinate Courts Rules). Likewise in the case of the former the Registrar of the relevant Subordinate Court will send the appeal record to the Registrar of the High Court concerned. In the case of the latter, the appellant's Counsel

will file the appeal record with the Registrar of the High Court. Section 28 of the Courts of Judicature Act states that "no appeal shall lie to the High Court" meaning that no record of appeal shall be received by the Registrar of the High Court where the amount in dispute "is ten thousand ringgit or less except on a question of law". In other words the Registrar of the High Court shall not have sight of the appeal record if any one of the two qualifications is not fulfilled. By implication therefore the Registrar of the Court below must have the power to decide whether the notice of appeal on the face of it carries any of the qualifications so as it can be accepted to be filed. Without the notice of appeal the record of appeal will be incomplete. The learned Counsel for the applicant contended that the Registrar of the Court below cannot look at s. 28 and he therefore cannot reject a notice of appeal. The simple answer to that, is that, it makes nonsense of s. 28. Both the Court below (in the case of an appellant without the assistance of Counsel) and the appellant's Counsel will have spent their time in futility in getting the record ready when the High Court in less than a second can decide to reject the appeal on the ground that it is not a fit and proper case to be brought before it as it has only to decide whether the amount in dispute is ten thousand ringgit or less or whether the appeal is on a question of law. I am of the view that in the case of an appellant intending to appeal on a question of law, the notice of appeal in Form 140 must state at least in general form the question or questions of law that he wishes to appeal on.

The learned Counsel for the applicant also contended that at the stage of filing the notice of appeal, there was no way of knowing what question or questions of law were intended to be pursued on appeal as the Magistrate or the Judge of the Sessions Court as the case may be, had not written his grounds of judgment. Surely the Counsel handling the case must know the question of law involved, if any, in his case. It is not necessary that the Court below must have decided on that particular point of law for the purpose of taking it on appeal under s. 28.

I accordingly dismissed the application with costs.

Also found at [1991] 3 CLJ 2892